In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA,
Petitioners

versus

LOUISIANA POWER & LIGHT COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Louisiana Power & Light Company (LP&L) respectfully submits that the Court should deny the petition for a writ of certiorari filed by petitioners Lafayette and Plaquemine (Cities).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which petitioners seek to have reversed is reported at 532 F.2d 431. That of the District Court may be found at 1975-1 Trade Cases ¶60,240.

JURISDICTION

This Court does have jurisdiction to entertain the petition under 28 U.S.C.§ 1254(1).

QUESTION PRESENTED

The Court of Appeals accurately stated the sole question

presented as "whether the actions of a city are automatically outside the scope of the federal antitrust laws." (532 F. 2d at 432, Petitioners' Appendix p. 1a.)

Petitioners' statement of the question presented, like their motion to dismiss which led to this proceeding, actually begs the question. There petitioners characterize themselves as "subdivisions of the State." As noted by the Court of Appeals, the Cities "would have us equate cities and states for purposes of determining 'state action'. No authority is cited for this proposition . . . . Moreover, it can scarcely be said that, as a general proposition, cities are automatically entitled to whatever legal protections the state itself can claim." (532 F.2d at 434, n. 6, Petitioners' Appendix p. 4a.)

STATEMENT OF THE CASE

Louisiana Power & Light Company's amended counterclaim charges Lafayette and Plaquemine with having violated the antitrust laws. Lafayette and Plaquemine moved for a dismissal of the counterclaim on the grounds they were not bound by the antitrust laws of the United States. The Cities' Rule 12 motion to dismiss and for judgment on the pleadings recited as grounds:

> "...[S]aid Counterclaim charges antitrust law violations which are not applicable to the states or their instrumentalities. The plaintiffs are municipalities, bodies corporate and politic and subdivisions of the State of Louisiana. As such, the Counterclaim, as amended, does not assert a valid claim and should be dismissed."(Record 000045.)

The antitrust violations charged relate to the Cities' ownership and operation of their utility systems.

The United States District Court for the Eastern District of Louisiana dismissed the counterclaim because it felt constrained to do so by its understanding of the decision of the United States Court of Appeals for the Fifth Circuit in *Saenz v. University Interscholastic League*, 487 F. 2d 1026 (5th Cir. 1973). But as the District Court stated at the conclusion of its Reasons for Judgment:

> "The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity: activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and implication of the *Saenz* case it shall be this court's holding that purely state governmental activities are not subject to the requirements of the antitrust laws of the United States."[1] (1975-1 Trade Cases, ¶60,240 at p. 65,950, Petitioners' Appendix p. 13a.)

Between the District Court's reluctant holding, in early 1975, that the antitrust laws did not apply to the Cities even in their conduct of "what is clearly a business activity:

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1. Petitioners take this last sentence out of its context by their description of what the District Court "ruled" (Petition, p. 4). The extra-record reference at the bottom of that page to the role played by the Justice Department in an AEC proceeding is likewise a mischaracterization, apparently intended for some "psychological" effect.

activity in which a profit is realized" and the reinstatement in 1976 of that counterclaim by the United States Court of Appeals for the Fifth Circuit fell *Goldfarb v. Virginia State Bar*, 421 U.S. 773. There this Honorable Court acted to clarify *Parker v. Brown*, 317 U.S. 341. Thus the Court of Appeals noted: "The trial court in the present case acted without the benefit of the Supreme Court's only major post-*Parker* explication of the 'state action' doctrine." (532 F.2d at 433, Petitioners' Appendix p. 3a.)

The Court of Appeals responded to the Cities' argument that a decision adverse to them would overrule *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) by saying:

> "Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis v. Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*." (532 F.2d 435, Petitioners' Appendix, p. 7a.)

Therefore, in fidelity to its duty to apply the law of the land as interpreted by the Supreme Court of the United

States, the Court of Appeals reversed and remanded.

ARGUMENT

This Honorable Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, addressed itself directly to the question of "state action" immunity as applied to subordinate state agencies. There the plaintiffs had brought suit against the Virginia State Bar and Fairfax County Bar associations. Plaintiffs alleged the County Bar's adoption of a minimum fee schedule, declared by the State Bar to be an enforceable standard, constituted price-fixing and restraint of trade and commerce in violation of Section 1 of the Sherman Act. The District Court held that minimum fee schedules constituted price-fixing. The District Court also squarely held that the State Bar was immune under *Parker v. Brown* since it acted as an administrative agency of the Supreme Court of Virginia, although it found the County Bar could be held liable because it was a voluntary association of private persons. 355 F. Supp. 491, 495-496. The Court of Appeals for the Fourth Circuit agreed with the District Court that the State Bar was immune under *Parker v. Brown* (and that the *Parker v. Brown* immunity did not apply to the County Bar), but held against plaintiffs on other grounds. 497 F.2d 1. The plaintiffs then took the matter to this Court on petition for writ of certiorari.

This Court reversed the decision that the State Bar was not subject to the antitrust laws:

> "In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that an anticompetitive marketing program which 'derived its authority and its efficacy

from the legislative command of the state' was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government. *Id.*, at 350-352; *Olsen v. Smith*, 195 U.S. 332, 344-345 (1904). Respondent State Bar and respondent County Bar both seek to avail themselves of this so-called state-action exemption.

"Through its legislature Virginia has authorized its highest court to regulate the practice of law. That court has adopted ethical codes which deal in part with fees and, far from exercising state power to authorize binding price fixing, explicitly directed lawyers not 'to be controlled' by fee schedules. *The State Bar, a state agency by law,* argues that in issuing fee schedule reports and ethical opinions dealing with the fee schedules it was merely implementing the fee provisions of the ethical codes. The County Bar, although it is a voluntary association and not a state agency, claims that the ethical codes and the activities of the State Bar 'prompted' it to issue fee schedules and thus its actions, too, are state action for Sherman Act purposes.

"The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S., at 350-352; *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962). Here we need not in-

quire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. *Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees,* leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action: rather, *anticompetitive activities must be compelled by direction of the State acting as sovereign.*

"The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. *Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973). The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially

> a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act. *Parker v. Brown, supra,* at 351-352." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 788-791. (Emphasis added, footnotes omitted.)

In *Goldfarb* respondents could point to no state statute requiring their activities. The fact that an entity was a state agency for some purposes did not mean that entity was absolutely immune. If, on the facts of the case, the entity is merely attempting to foster anticompetitive practices for the benefit of those who comprise it, then there may be liability.

In their petition for a writ of certiorari, the Cities predicate their claim for relief on the theory that "the Fifth Circuit misapprehended *Goldfarb* by viewing the challenged activities of the Virginia State Bar as activities of a 'state agency,' (Appendix A, at p. 3a). . . ." (Petition, pp. 8-9.) The exact words of the Court of Appeals to which petitioners refer at the place indicated are: "The state bar was a state agency by law . . . ."(Petitioners' Appendix at p. 3a. 532 F.2d at 433.)

Contrary to petitioners' representation, the characterization of the Virginia State Bar as "a state agency by law" was not error by the United States Court of Appeals for the Fifth Circuit, but rather the very words used by this Honorable Court: "The State Bar, *a state agency by law,* argues that in issuing fee schedule reports and ethical opinions dealing with fee schedules it was merely implementing the fee provisions of the ethical codes." (*Goldfarb,* 421 U.S.

at 789-790, emphasis added.) It was the Fairfax County Bar Association which this Court found, unlike the State Bar, was not a state agency.[2] Thus the County Bar's status was quite different from that of the State Bar, which the Court also described as "the administrative agency through which the Virginia Supreme Court regulates the practice of law in that State...." (*Goldfarb,* 421 U.S. at 776.)

Thus it is plain that petitioners' quarrel lies with this Court's decision in *Goldfarb* rather than with the appellate court's interpretation of *Goldfarb.* In actuality petitioners are asking this Court to reverse what it said in *Goldfarb.*

As pretext for their petition, Cities have seized upon this Court's opinion in *Cantor v. Detroit Edison Co.,*_U.S._, 96 S. Ct. 3110. That case is inapposite: even if *only* state agents were immune under the *Parker v. Brown* rule, it would not follow that *all* state agents were immune, just as it does not follow from the proposition *only* men have hemophilia that *all* men have hemophilia. *Cantor* does not affect the applicability of *Parker* and *Goldfarb* to the instant case, as a brief survey of the three cases shows:

In *Parker v. Brown,* 317 U.S. 341, this Court held that the Sherman Act did not apply to invalidate restraints im-

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2. "The County Bar, although it is a voluntary association and not a state agency, claims that the ethical codes and the activities of the State Bar 'prompted' it to issue fee schedules...." *Goldfarb,* 421 U.S. at 790.

posed by the state *as sovereign:*

> "...We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from *activities directed by its legislature*. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .
>
> * * *
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*" (317 U.S. at 350-352, emphasis added.)

In *Goldfarb* this Court explained:

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the

> Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker v. Brown* . . . . It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as sovereign*. . . ." 421 U.S. at 790-791.

In *Cantor v. Detroit Edison*, —U.S.—, 96 S. Ct. 3110, 3116 this Court reiterated that *Parker* "held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act." However *Cantor*, unlike *Goldfarb*, did not deal directly with the question of the liability of a state agency.

The petitioners have utterly failed to demonstrate that there is any inconsistency among the Circuits to warrant review of this matter on the bare-bones pleadings that now exist. The analysis of the Fifth Circuit is consistent with *Cantor*, as well as with *Parker* and *Goldfarb*, *i.e.*: "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive constraint." (532 F.2d at 434, Petitioners' Appendix, pp. 4a-5a.)

The analysis given by the Third Circuit in the wake of *Goldfarb* is likewise consistent with the opinions of this Court and with that of the Fifth Circuit. In *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277, 1280 (3rd Cir. 1975) that Court of Appeals reversed the dismissal of three municipal corporations from a private antitrust action. It acted

on the basis of the interpretation of *Parker v. Brown* given by this Court in *Goldfarb*:

> "We read *Goldfarb* as holding that, absent state authority which demonstrates that it is the intent of the state to restrain competition in a given area, *Parker*-type immunity or exemption may not be extended to anti-competitive governmental activities. Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity."

Petitioners rely upon *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974) to create the appearance of a conflict between the Ninth and Fifth Circuits. In reality there is no conflict because *American Petrofina* was decided before this Court clarified the law in deciding *Goldfarb*.[3] It must be presumed that the Ninth Circuit, like the Fifth, will do its duty in light of the *Goldfarb* decision and apply this Court's authoritative interpretation of the law. The same may be said of any of the decisions of other circuits, mentioned by petitioners (Petition p. 7, n. 5), which, upon analysis, might prove inconsistent with this Court's subsequent decisions in *Goldfarb* and

3. See also pp. 14-16, *infra*. Of course, the Ninth Circuit itself recognized that its "conclusion that a state (once found indeed to be a state) is not covered by sections 1 and 2 of the Sherman Act is inconsistent with the rationale of *Hecht [v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971)]."

Cantor.[4]

Likewise without merit are petitioners' attempts to have this Court review the Fifth Circuit's decision on the ground that the decision is inconsistent with other decisions of the Fifth Circuit. *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*, 539 F.2d 418 (5th Cir. 1976), simply found that it was improper to stay antitrust proceedings under the doctrine of primary jurisdiction for prior reference to an agency of a *Parker* defense raised by a private utility. There was no question in the *Litton* case of the applicability of the antitrust laws to any alleged subordinate state agency. The casual comment in a footnote about which petitioners make much ado is the most *obiter* of *dicta*.[5]

The Cities further represent to this Court that "[t]he United States also takes the position that *Goldfarb* involved 'a private body. . . comprised of persons having a direct financial interest in the subject matter of the anti-

4. An extensive analysis of the pre-*Goldfarb* and *Cantor* cases which petitioners cite would not serve any purpose here, though even an analysis of the old cases fails to support petitioners' position. In addition to cases cited by petitioners, see *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Woods Exploration and Producing Co., Inc. v. Alcoa*, 438 F.2d 1286 (5th Cir. 1971); *Azzaro v. Town of Bradford*, 1974-2 Trade Cases ¶ 75,337 (D. Conn., 1974); *Fox v. James B. Beam Distilling Company*, 1974-2 Trade Cases, ¶ 75,335 (S.D. Ind. 1974); *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974). See also pp. 14-16, *infra*.

5. Footnote 8 merely makes reference in a couple of sentences to certain views expressed by Professor Handler. See also Handler, *Twenty-Fourth Annual Antitrust Review*, 72 *Columbia Law Review* 1, 18 (1972). For the Fifth Circuit's application of *Parker v. Brown* as interpreted by *Goldfarb*, see also *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975).

competitive restraint' and distinguishes *Goldfarb* from a situation where an agency of state government is itself charged with violations of the federal antitrust laws. Brief of the United States as Amicus Curiae at 18, *Bates v. State Bar of Arizona, supra.*" (Petition, p. 9, n. 6.) The deletion made by Cities from the Government's brief, indicated above, is of the crucial words "that is a 'state agency' only for limited purposes". (Brief of United States in *Bates*, p. 18.)

The true position that the United States takes with respect to *Goldfarb* is spelled out in a matter that first came before this Court last term as *Texas State Board of Accountancy v. United States of America*, No. 75-531, *cert. den.* December 15, 1975. There this Court refused to grant certiorari in a case where the United States Court of Appeals had overturned[6] the quashing,[7] on the grounds of *Parker v. Brown*, of a civil investigative demand by the Justice Department to a state agency.

Subsequently, the United States filed a civil suit against the same state agency and, in the Government's Brief in Opposition to Defendant's Motion to Dismiss (predicated on *Parker v. Brown*), stated:

> "Defendant asserts that it 'is a state agency and the action challenged is the action of the state, itself, mandated by statute.' [*Memorandum in*

6. *Texas State Board of Public Accountancy v. United States*, 5th Cir., No. 75-2626, Motion for Summary Reversal by United States, *granted* August 11, 1975.

7. *Texas State Board of Public Accountancy v. United States*, Civil Action No. A-74-CA-270, Memorandum Opinion and Order (W.D. Tex., April 16, 1975).

Support of Motion to Dismiss, page 7.] The types of broad legal generalizations that defendant espouses to justify its 'state action' immunity claim are indeed tempting. They have been repeatedly rejected. Vague phrases like 'official action,' 'legislative mandate,' and 'state agency' are simply not sufficiently self-defining to permit automatic conclusions, particularly as to so serious a matter as antitrust immunity. As the Court of Appeals for the Fifth Circuit has pointed out, '[t]he concept of state action is not susceptible to rigid, bright-line rules.' *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438F.2d 1286, 1294 (1971),*cert. denied*, 404 U.S. 1047 (1972). Thus, if anything is clear regarding 'state action' immunity claims, it is that a hard, close examination of the facts is necessary before particularized legal conclusions can be drawn in any case. Only where there is *no doubt* that the defendant is the State itself can the inquiry be quickly ended, *see New Mexico v. American Petrofina*, 501 F.2d 363, 370 (9th Cir. 1974). The factual exposition in *Parker* strongly indicates the need for close scrutiny, as do the Supreme Court's factual examinations in the two most significant decisions on the 'state action' immunity issue since *Parker*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976).

> "In particular, it is clear that simply because a defendant is considered an 'instrumentality' of the state [*See* United States v. Oregon State Bar, 385 F. Supp. 507, 511 (D. Ore. 1974).] or a 'state

agency for limited purposes,' [*See* Goldfarb v. Virginia State Bar, *supra*, 421 U.S. at 791.] or indeed any 'subordinate state governmental body,' [*See* City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976).] it is not, in the words of the Fifth Circuit, *'ipso facto'* exempt from the operation of the antitrust laws. [*Id.*] . . . ." Government's Brief in Opposition to Defendant's Motion to Dismiss, pp. 7-8 (footnotes raised to text by brackets) filed February 2, 1977 in *United States v. Texas State Board of Public Accountancy,* Civil Action No. A-76-CA-219 (W.D. Tex.).

In sum, it is clear under *Goldfarb* that an entity, there described by this Court as a "state agency by law"[8] described by the Fifth Circuit as a "state agency by law"[9] and as a "subordinate state governmental body",[10] described by the United States in its *Bates* brief as a " 'state agency' only for limited purposes"[11] is not, as petitioners would have it, *ipso facto* exempt under *Parker v. Brown*. Under Louisiana law petitioners are precisely such an entity as described:

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8. 421 U.S. at 789-790.

9. 532 F.2d at 433.

10. *Id.*, 434.

11. Brief of the United States as Amicus Curiae, p. 18, *Bates v. State Bar of Arizona,* No. 76-316.

"A municipal corporation . . . is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated and not common to the State or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. It possesses two classes of powers and two classes of rights - public and private. In all that relates to one class it is merely the agent of the State and subject to its control; *in the other it is the agent of the inhabitants of the place - the corporators - maintains the character and relations of individuals, and is not subject to the absolute control of the Legislature, its creator." New Orleans, Mobile and Chattanooga Railroad Company v. City of New Orleans*, 26 La. Ann. 478, 481 (1874) (Emphasis added.)

Moreover, in the activity at issue here, the operation of municipal utility systems, it is clear that petitioners neither act as sovereign nor by command of sovereign to be anti-competitive:

> "In this state a municipal corporation, when engaged in the operation of a public utility, is subject to the same rules that are applicable to a private corporation. See *Vicksburg, S. & P. Railway Co. v. City of Monroe*, 1927, 164 La. 1033, 115 So. 136, supra." *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 892; 112 So.2d 635, 650 (1959).

These rules include those of the antitrust law. Louisiana law exacts compliance with the principles and policies of the antitrust laws. Not only does the state have its own antitrust statute, La. R.S. 51:121, *et seq.*, but both State and Federal antitrust laws must be deemed part of the

"restrictions imposed by general law for the protection of other communities" which municipalities are bound under La. R.S. 33:621 to observe in the operation of their utility systems.

When one strips away petitioners' erroneous legal verbiage, all that remains is a naked policy argument that municipal corporations, even when engaged in profit-making business, should not be bound by the antitrust laws. Petitioners have shown no reason why they should enjoy such a privileged status. They wish to hold their competitors to the standards of the antitrust laws, but to be free of those standards in their own business conduct. However, the consumer is as much injured by anticompetitive conduct of a municipal corporation engaging in business for a profit as by the same conduct performed by a private business corporation. As shown above, petitioners' preferences as to policy are not those adopted by the State of Louisiana through its Legislature.

CONCLUSION

For the foregoing reasons Louisiana Power & Light Company respectfully prays that the petition of Lafayette and Plaquemine for writ of certiorari be denied.

Respectfully submitted,

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BY: /s/ Andrew P. Carter
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CERTIFICATE OF SERVICE

I, Andrew P. Carter, Attorney for the Respondent, do hereby certify that I have served the Petitioners with three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same in a properly addressed envelope with proper postage prepaid to Jerome A. Hochberg, Esq., 1990 M Street, N.W., Washington, D. C., attorney of record for Petitioners.

This the ___ day of March, 1977.

MONROE & LEMANN

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